

BEFORE THE

RECEIVED**Federal Communications Commission****APR 20 1993**

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of
GAF BROADCASTING COMPANY, INC.
For Renewal of the License
of FM Broadcasting Station WNCN
New York, New York
CLASS ENTERTAINMENT
AND COMMUNICATIONS, L.P.
THE FIDELIO GROUP, INC.
For a Construction Permit
for a New FM Station on
104.3 MHz at New York, New York

MM Docket No. 93-54

File No. BRH-910201WL

File No. BPH-910430ME

File No. BPH-910502MQ

To: The Commission

OPPOSITION TO MOTION**FOR DEFERRAL OF PROCEDURAL DATES**

GAF Broadcasting Company, Inc. ("GAF") hereby opposes the April 12, 1993 Motion for Deferral of Procedural Dates filed by a competing applicant in the above-captioned renewal proceeding, The Fidelio Group, Inc. ("Fidelio").¹ Fidelio's Motion violates the FCC rules. Its claims are also grossly exaggerated, and demonstrate no real need to further delay this proceeding more than two years after GAF filed its renewal application. Fidelio should not be permitted to stall this comparative proceeding simply to serve the interests of another group, the Listeners' Guild, Inc. (the "Guild"), which is not even a party.

1. **Background.**

As the Commission is well aware, the Guild, a group which purports to represent WNCN listeners, has been filing challenges against the station's licensees before the Commission and various courts for nearly twenty years. As part of this ongoing campaign, the Guild petitioned to deny GAF's 1988 application for FCC consent to a transfer of control pursuant to a leveraged buy out of the licensee's parent (File Nos. BTCH-880322-GF & GG). The Mass Media Bureau denied the Guild's Petition in its entirety, concluding that it raised no substantial and material question of fact warranting deferral or a hearing. See Letter from the Chief, Mass Media Bureau, to David M. Rice, Reply No. 8920-JO, dated November 14, 1988. The Guild filed a petition for reconsideration, which remained pending until 1992 (the transfer was consummated in March of 1989).

Based on the Guild's pending allegations, a future renewal challenger, Class Entertainment and Communications, L.P. ("Class"), filed a petition requesting that GAF be required to submit an early renewal application. GAF filed its renewal application in the normal course, however, on February 1, 1991. The Guild and Class both filed petitions to deny that application, which reiterated the Guild's earlier arguments, although the Guild also made several new allegations. In addition, the New York State Conference of Branches of the NAACP (the "NAACP") filed a petition to deny GAF's renewal application based on WNCN's employment profile, which it subsequently requested the

Commission dismiss pursuant to a settlement with GAF.

By Memorandum Opinion and Order, 7 FCC Rcd 3225 (1992), the full Commission rejected the arguments raised in the Guild's petition for reconsideration and Class' request for early renewal, thus affirming GAF's qualifications to remain an FCC licensee. Moreover, the Commission made its decision dispositive on the same arguments raised by the Guild and Class in their petitions to deny WNCN's pending renewal application. The Guild and Class filed notices of appeal with the U.S. Court of Appeals for the District of Columbia Circuit, which has set a briefing schedule for next June through September (Docket Nos. 92-1269, 92-1270).

In accordance with the Commission's 1992 Memorandum Opinion

Memorandum Opinion and Order affirming GAF's qualifications to the Court of Appeals, (b) the EEO Branch's review of WNCN's EEO record, and (c) "any pleadings" the Guild may file seeking to intervene in this proceeding or reconsideration of the HDO.²

2. Fidelio's Motion Must Be Dismissed As An Unauthorized Application For Review Of The HDO.

Initially, the Commission should dismiss Fidelio's Motion as an unauthorized and illegitimate application for review of the HDO by an applicant designated for hearing. Section 1.115(e)(3) of the FCC rules clearly prohibits the filing of an application for review of an HDO until the Review Board issues a final decision, unless the presiding judge certifies such an application for special reasons. 47 C.F.R. Sec. 1.115(e)(3). No such certification was requested here.

In the HDO in this comparative proceeding, the Mass Media Bureau determined that the proceeding should begin before the EEO Branch completed its review of WNCN's EEO record. Clearly, the staff believed that, more than two years after GAF filed its renewal application, the hearing should not be postponed any further based on delays encountered due to backlogs in the EEO Branch. Thus, it conditioned the grant of WNCN's renewal on the outcome of EEO Branch review. By requesting that the Commission now defer this hearing, after the Bureau determined that the hearing should proceed, Fidelio is in reality seeking review of the Bureau's decision. Accordingly, Fidelio's Motion should be

²The Guild petitioned for reconsideration of the HDO on April 14, 1993.

denied as an attempt to circumvent the strict requirements of Section 1.115(e)(3) of the FCC rules.

3. Fidelio Has Not Demonstrated Any Need For Deferral.

Fidelio asserts that the HDO "slice[d] and dice[d] the various pending issues in various different ways," "directing them to various different fora for disposition." According to Fidelio, this will consign the parties to "dramatically" more complicated litigation subject to disruption, duplication of effort, and delay. Motion at 2-3, 6. Even if Fidelio's unauthorized application for review could be entertained, its claims are grossly exaggerated and fail to demonstrate any real need for deferral of the procedural dates in this proceeding.

Initially, for all its rhetoric concerning the burden on "the parties" of litigating in different fora, Fidelio ignores the fact that it never filed a petition to deny GAF's 1991 renewal application. Nor did Fidelio challenge GAF's 1988 transfer application or join in the appeal of the 1992 Memorandum Opinion and Order affirming GAF's qualifications. Thus, no allegations made by Fidelio are pending before any forum, judicial or administrative. It is difficult to understand exactly what burden Fidelio claims that it will have to bear. Fidelio's claims on behalf of the NAACP are particularly ironic, given that Fidelio never questioned WNCN's EEO record, while the NAACP has requested that its own petition be withdrawn.³

³Fidelio never even addressed WNCN's EEO record until October 5, 1992, when it filed "Comments" concerning GAF's settlement with the NAACP.

Furthermore, Fidelio grossly mischaracterizes the HDO by claiming that it directed various issues to various fora. On the contrary, the HDO resolved all of the numerous allegations raised with one narrow exception, WNCN's EEO record. It is not uncommon for the Commission to designate a renewal application for a comparative hearing despite the fact that allegations concerning the applicant are pending elsewhere at the Commission. See, e.g., Western Cities Broadcasting, Inc., 5 FCC Rcd 6177 (HDO, 1990) (renewal grant conditioned on final decision in another proceeding, in which principal had been found to be an undisclosed real-party in interest).

GAF filed its renewal application on February 1, 1991. This proceeding was not designated for hearing until March 15, 1993, more than two years later. As the Mass Media Bureau recognized, there is no justification for further delay. While initiation of a hearing now will not prejudice Fidelio, which has no unresolved petition or appeal in any other forum, further delay will harm GAF. For the past two years, GAF has been forced to operate WNCN, an award-winning and nationally-respected classical music station, under the cloud of renewal challenges. The Commission should not further delay GAF's opportunity for its renewal application to be addressed on the merits and on WNCN's enviable record of achievement.

4. Fidelio Should Not Be Permitted To Stall This Proceeding On Behalf Of The Guild.

Much of Fidelio's Motion is devoted to arguments concerning the purported harm caused by the HDO to the Guild. Initially,

Fidelio criticizes the HDO for allegedly failing to state whether the Guild should be considered a party to this proceeding.

Fidelio asserts that as a result, the Guild may "have to" seek leave to intervene in order to provide the Commission with information relevant to GAF's performance and "qualifications." Fidelio also argues that because the HDO did not address certain of the Guild's allegations (apparently a reference to the pending EEO review) the Guild may "have to" seek reconsideration of the HDO. Motion at 2-4.

The fact that the Guild's frivolous arguments have so far proven unsuccessful clearly does not warrant deferral of this renewal proceeding. There is no doubt as to whether the Guild was named a party to this proceeding -- it was not. No issue sought by the Guild was designated for hearing by the HDO. Thus, the HDO did not name the Guild as a party, and the Guild properly did not file a notice of appearance.⁴ Should the Guild seek to intervene, it will not be because of any ambiguity in the HDO but rather because it desires to continue its campaign of harassment against GAF.

As noted above, Fidelio is not a party to the judicial appeal and has no petition to deny pending before the EEO Branch. Clearly, Fidelio seeks to delay this proceeding only to benefit the Guild, which has not been made a party. That Fidelio would

⁴The attached service list includes counsel for two groups that received copies of Fidelio's Motion, the Guild and NAACP, who are not parties to this comparative renewal hearing and thus will not be served with copies of GAF's filings directed to the ALJ.

seek to promote the Guild's interests should not be surprising, given that Fidelio is largely a creation of the Guild.

On May 1, 1991, the Guild filed a petition to deny WNCN's renewal, supported by the May 1 declaration of its Chairman and long time director, T'ing Pei. The next day, Mr. Pei filed a competing application for the WNCN frequency under the name Fidelio. Fidelio's counsel is now privy to the Guild's litigation strategy. See Motion at n.1. Apparently the Guild and its former leader hoped to pressure GAF on two fronts in this proceeding. Indeed, this is the third time that the Guild has petitioned to deny a WNCN renewal application while one or more Guild members participated in the filing of a competing application. If Fidelio is a bona fide applicant, as it purports, it should be ready to contend for WNCN's frequency now. It must not be permitted to delay this proceeding simply to benefit the Guild.

5. The Standards For A Judicial Stay Do Not Support Grant Of Fidelio's Motion.

Without citation to relevant FCC precedent, Fidelio argues that to the extent its Motion is subject to the judicial standards governing stay requests, those standards would be satisfied. Motion at 5-6. On the contrary, assuming that such

of success on the merits. Nor does it provide any case support for the convenient assertion that the first prong of the judicial test should be omitted here. As Fidelio is well aware, the arguments raised in the Guild's appeal before the D.C. Circuit have consistently been rejected as contrary to well-established FCC policy. See Letter From the Chief, Mass Media Bureau, dated November 14, 1988; Memorandum Opinion and Order, 7 FCC Rcd 3225 (1992); Hearing Designation Order, DA 93-226, released March 15, 1993.

Second, Fidelio will not be "irreparably injured" by engaging in even "fundamentally inefficient and impractical litigation." Indeed, Fidelio is not even litigating before another forum. Third, GAF would be harmed by further delay. Obviously, WNCN is not operating normally and without impediment, as Fidelio claims. On the contrary, WNCN must operate indefinitely under the cloud of a contested renewal, awaiting a grant of its 1991 renewal application, despite its record of meritorious service. Under the fourth criterion, GAF respectfully submits that the public interest would best be served by the prompt initiation and resolution of this comparative proceeding.

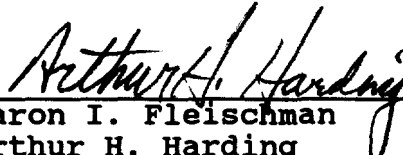
Finally, Fidelio's inference that the Commission is unwilling to give it the "opportunity to compete on an even basis" for the WNCN license, because of a purported bias by the Commission against renewal challengers, is outrageous. Motion at 6. As the Review Board recently observed, such rhetoric "is

out of date and demonstrably false." Fox Television Stations, Inc., FCC 93R-9, Review Board, released March 10, 1993 at n.189. Having filed an application and been designated for hearing, Fidelio now seeks to postpone this proceeding. Having had the opportunity to raise allegations against the WNCN renewal application in a petition to deny, Fidelio declined to do so. Fidelio's sister group, the Guild, has had and taken every opportunity to make all sorts of allegations against GAF before the Commission. Fidelio cannot be heard to claim that the Commission has placed any impediment in the path of challenges to GAF's stewardship of WNCN.

WHEREFORE, In light of the foregoing, it is respectfully requested that Fidelio's Motion For Deferral Of Procedural Dates be DENIED.

Respectfully submitted,

GAF BROADCASTING COMPANY, INC.



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Dated: April 20, 1993

CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 20th day of April, 1993 placed a copy of the foregoing "Opposition To Motion For Deferral Of Procedural Dates" in U.S. First Class Mail, addressed to the following:

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